DEATH DUTIES.

History.

DEATH duties had their origin perhaps in ancient Egypt. They were imposed in Rome under the Emperor Augustus,[1] and have been more or less constantly recognized as a proper source of revenue of all civilized nations in one form or another, ever since that time. In continental Europe death duties have been imposed for a great number of years, usually in the form of stamp taxes.[2] In 1694 a probate duty law was adopted in England, which was a fixed tax dependent upon the amount of the personal estate of the decedent, and in the form of a stamp tax. In 1780 this tax was supplemented by what was then known as a legacy tax,[3] and this was perhaps the first well defined "inheritance tax" law. In 1797 the United States Congress adopted a legacy tax, and in 1826 the State of Pennsylvania adopted a tax of this nature.

The United States Government has adopted death duties, with the one exception of the Act of 1894, which was held unconstitutional, only under the pressure of war emergencies, and such duties have been removed when the emergency expenditures had been satisfactorily taken care of. The Act of 1797 continued in effect until June 30, 1802.[4]

During the Civil War, Congress again adopted death duties. By Act of July 1, 1862,[5] Congress imposed death duties which comprised both a tax upon the beneficial shares and a tax upon the estate of decedent as a whole. In 1864 the Act was re-enacted so as to include real estate, and raise the rate. The Act of 1864 was again amended in 1866, but no material change was made in the system. This Act was in many respects identi-

[1] GIBBON, DECLINE AND FALL OF THE ROMAN EMPIRE, Vol. 1, p. 163.

[2] CHON, SCIENCE OF FINANCE; DOS PARSON, INHERITANCE TAX, Sec. 1.

[3] DOWELL, HISTORY OF TAXATION IN ENGLAND, p. 148; HANSON, DEATH DUTIES, p. 1; Hill v. Atkinson, 2 Merivale 45.

[4] 2 Stat. L. 148, chap. 19.

[5] 12 Stat. L. 485, chap. 119.

cal to the death duty laws existing in England at that time, and in interpreting this Act, the Supreme Court of the United States in the case of Scholey *v.* Rew [6] expressly states that some of its provisions were largely borrowed from an Act of Parliament. This Act was finally repealed on July 14, 1870.

In 1894, a form of legacy tax was included in an income tax act.[7] This act was held unconstitutional as being a direct tax and not apportioned, in the case of Pollock *v.* Farmers Loan and Trust Co.[8]

The Spanish War Tax was adopted by Congress on June 13, 1898,[9] and was amended on March 2, 1901,[10] so as to exempt charitable institutions, and so as to provide for an adequate form of procedure in the enforcement of the law. This Act was repealed on April 12, 1902.[11]

By an Act adopted September 8, 1916,[12] and amended on March 3, 1917,[13] Congress levied an estate tax, imposing a duty upon every estate, the total net value of which exceeds fifty thousand dollars, which is now in existence.

NATURE OF DEATH DUTIES.

Death duties are universally deemed to relate, not to property *eo nomine,* but to its passage by will or descent. In other words the public contributions which death duties exact is predicated upon the passing of property as a result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as a result of intestacy.[14] In the consideration of death duties, the courts have universally recognized that such taxes are not levied upon property, but upon the right to transmit and inherit property.[15] A death duty is a tax upon the transmission or *transitus* of the property, and is imposed by virtue of the right of the State to require a party, or parties, who take the benefit of a civil right (*i. e.* the right to transmit

[6] 23 Wall. 331.
[7] 28 Stat. L. 553, chap. 349.
[8] 157 U. S. 429, 586; 158 U. S. 601.
[9] 30 Stat. L. 448, chap. 448.
[10] 31 Stat. L. 946.
[11] 32 Stat. L. 406.
[12] 39 Stat. L. 777.
[13] 39 Stat. L. 1002.
[14] Knowlton *v.* Moore, 178 U. S. 41.
[15] GLEASON & OTIS, INHERITANCE TAXATION.

or receive property upon death) given or secured to him by the State, to pay a premium for its enjoyment.[16]

The fact that State bonds are not taxable by the State does not prevent the right to transmit or receive them from being taxed.

It is of course not open to question that a State cannot tax obligations of the United States.[17] And it is equally as well settled that the United States cannot tax State or municipal bonds.[18] We come now to consider the right of a State to prevent the amount of United States bonds held from being exempt on the appraisal of an estate for the purpose of assessing death duties; and the right of the United States to deny an exemption of the amount of State bonds held for the purpose of determining the death duties imposed by the Federal government. It may be well argued that the States have no power to impose any tax or other burden of any nature which would tend to prevent or hinder the United States from borrowing money under the most auspicious and favorable conditions. This question was carefully considered by the Supreme Court of the United States in the case of Plummer *v.* Coler,[19] in which Mr. Justice Shiras held that it was well established that the death duty was an excise tax, and not a tax upon the property; that the State had a right to demand a premium for the enjoyment of the right granted and secured by it, and that the possible effect of impairing the borrowing power of the United States was of too remote a nature to justify the uprooting of the principles which had been adopted by the legislative bodies and courts of many of the States. Mr. Justice White dissented.

As the tax is on the *transitus,* and the *transitus* takes place immediately upon the death, the tax attaches as of that moment, and in appraising the value of the estate or inheritances for the purpose of determining the death duties, the values at the moment of death govern.[20] It follows, therefore, that in-

[16] Eyre *v.* Jacob, 14 Gratt. (Va) 422, 73 Am. Dec. 367; Magoun *v.* Illinois, etc., Bank, 170 U. S. 283; Knowlton *v.* Moore, *supra.*

[17] Home Ins. Co. *v.* New York, 134 U. S. 598.

[18] Mercantile Bank *v.* New York, 121 U. S. 138.

[19] 178 U. S. 114.

[20] *In re* Ramsdill's Estate, 190 N. Y. 492, 83 N. E. 584; Kingsbury *v.* Chapin, 196 Mass. 533, 82 N. E. 700.

terest, dividends, gains or increases in value during the administration of the estate are not considered or subject to taxation.[21] Nor does a loss or shrinkage in value during the administration affect the tax,[22] as that is fixed at the moment of death. Of course these general principles may, perhaps, be changed, or exceptions provided for by the State. Most of the States have adopted very elaborate statutes which definitely provide how estates shall be assessed in such instances.

To discuss the determination of the basis of taxation in cases of life estates, annuities and remainders would unduly prolong this article. Suffice it to say that many of the statutes have expressly and definitely provided for treatment of such estates.

Gifts, in the consideration of death duties, may be divided in four classes: 1. Gifts *inter vivos;* 2. Gifts *causa mortis;* 3. Gifts in contemplation of death; 4. Gifts to take effect in possession or enjoyment at or after death. Generally speaking, gifts *inter vivos* are not taxable transfers, while the others are.[23] This phase of the tax is also usually definitely and fully taken care of by the statutes.

Kinds of Death Duties.

Death duties may be divided into two distinct classes: *Estate Taxes* and *Inheritance Taxes.* These two taxes are essentially different, and the failure to observe this distinction has caused a good deal of litigation. Legislative bodies, wishing to gain the advantages of both in one law, have often become confused and as a result such acts have been held unconstitutional.[24]

The Estate Tax.

The Estate Tax is a tax assessable and chargeable on the estate of a decedent as a whole. It is a tax based on and determined by the value of the estate which ceased by reason of the death of the decedent. There may or may not be exemp-

[21] Matter of Vassar, 127 N. Y. 1, 27 N. E. 394.

[22] Matter of Penfield, 216 N. Y. 163, 110 N. E. 497.

[23] Gleason & Otis, Inheritance Taxation, p. 66.

[24] *In re* Cope's Estate, 191 Pa. 1, 45 L. R. A. 316, 43 Atl. 79; Stellwagen *v.* Durfee, 130 Mich. 166, 89 N. W. 728; Black *v.* State, 113 Wis. 205, 89 N. W. 522.

tions allowed, and the tax may or may not be graduated in accordance with the value of the net estate. It is very hard to conceive of just how the degree of relationship or the value of the respective shares of the beneficiaries can fairly be considered in the assessment of an estate tax; however, the State of Connecticut has apparently endeavored to do this.[25] It is believed that the States of Connecticut and Utah are the only States which have adopted an estate tax.

The United States Government on September 8, 1916, adopted an estate tax, which imposes a tax upon the net estate of all decedents in excess of fifty thousand dollars, the amount of the exemption allowed. The tax is graduated in accordance with the value of the net estate.

The Inheritance Tax.

The Inheritance Tax is assessable and chargeable according to the value of the respective shares of each of the beneficiaries to whom the estate passes. It is a tax on the interest or estate to which some person succeeds on a death. The determination of the amount of the inheritance tax is made without regard to the value of the whole estate of the decedent. It may or may not allow exemptions; it may or may not be graduated according to the value of each share; and it may or may not be graduated according to the degree of relationship of the respective beneficiaries The inheritance tax is undoubtedly the fairest form of death duties, and has been adopted by almost every State in the United States. The Act of 1898 adopted by the United States was an inheritance tax, and the whole question of inheritance taxation is fully and admirably treated by Mr. Justice White (now Mr. Chief-Justice White) in the case of Knowlton *v.* Moore.[26]

Situs of Property in Determining Tax.

This question of what property shall be considered in determining inheritance taxes is usually treated quite fully in the various State statutes, and it is hard to lay down any fixed general

[25] Curtis *v.* Corbin (Conn.), 107 Atl. 506.

[26] *supra.*

principles. The invasion of this phase of the matter would necessarily involve many intricate questions of conflict of laws which would unduly prolong this article.

It is well established that a State has the power in some instances to require an inheritance tax of non-residents. Non-residents may be required to pay an inheritance tax to a State based on real estate which passes within its borders; and the same is true in the case of non-residents owning shares of stock in a domestic corporation, regardless of the physical location of the certificates. This question is treated quite fully in GLEASON & OTIS, INHERITANCE TAXATION, and in the case of People *v.* Union Trust Co.[27]

THE POWER OF THE STATE TO ENACT DEATH DUTIES.

In 1858, Judge Lee, delivering the opinion of the Supreme Court of Appeals of Virginia in the case of Eyre *v.* Jacob,[28] decided:

> "The right to take property by devise or descent is the creature of the law, and secured and protected by its authority. The legislature might, if it saw proper, restrict the succession to a decedent's estate, either by devise or descent to a particular class of his kindred, say to his lineal descendants and ascendants; it might impose terms and conditions upon which collateral relations may be permitted to take it; or it may to-morrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions, and declare that upon the death of a party his property shall be applied to the payment of his debts, and the residue appropriated to public uses.
>
> Possessing this sweeping power over the whole subject, it is difficult to see upon what ground its right to appropriate a modicum of the estate, call it a tax or what you will, as the condition upon which those who take the estate shall be permitted to enjoy it can be successfully questioned."

The above case was decided by a divided Court of three to two, Judges Daniel and Moncure dissenting. At that time there must have been a great deal of adverse comment caused by such a broad statement of law. This opinion, in years gone by, has

[27] 255 Ill. 168, 99 N. E. 377. [28] *supra.*

been frequently discussed, differentiated and often disapproved by the courts of other States. In the case of Nunnemacher *v.* State,[29] the Supreme Court of Wisconsin "utterly rejects the doctrine of Eyre *v.* Jacob, 14 Gratt. (55 Va.) 422," and holds that "the right to demand that property pass by inheritance or will is an inherent right subject only to reasonable regulation by the legislature."

The doctrine as laid down in Eyre *v.* Jacob,[30] is also denied by the Supreme Court of Massachusetts in the case of Minot *v.* Winthorp,[31] as follows:

> "We assume that under the constitution this (i. e. the taking of all property by the State on the death of the owner) cannot be done either directly or indirectly; that the legislature cannot so far restrict the right to transmit property by will or by descent as to amount to an appropriation of property generally: that it cannot impose a tax which shall be equivalent or almost equivalent to the value of the property, and cannot so limit the persons who can take as heirs, devisees, distributees, or legatees that the great mass of all the property of the inhabitants must become vested in the commonwealth by escheat. The state can take property by taxation only for the public service, and we assume that its right to take property, if any exists, by regulating the distribution of it on the death of the owner is limited in the same manner and that this right must be exercised in a reasonable way."

Despite many dissenting opinions, and very infrequently a case following the doctrines laid down in Nunnemacher *v.* State, the principles enunciated in the case of Eyre *v.* Jacob, seem to have met with almost universal, though sometimes somewhat qualified, approval. In the case of United States *v.* Perkins,[32] decided in 1896, the Supreme Court of the United States held that "the right to dispose of his (a citizen's) property by will has always been considered purely a creature of statute and within legislative control." The principle is again adopted by the Supreme Court of the United States in the case

[29] 129 Wis. 190, 9 Ann. Cas. 711, 108 N. W. 627, 9 L. R. A. (N. S.) 121.

[30] *supra.*

[31] 162 Mass. 113, 38 N. E. 512.

[32] 163 U. S. 625.

of Magoun *v.* Illinois Trust and Savings Bank,[33] but with a dissenting opinion by Mr. Justice Brewer, in which he states that he cannot regard legacies and inheritances as merely privileges and favors granted by the State.

"True, the State may regulate," says Mr. Justice Brewer, "but it has no arbitrary power in the matter." Mr. Justice Brewer, proceeding, says:

> "The property of a decedent does not at his death become the property of the State, nor subject to its disposal according to any mere whim or fancy. And yet if it is a purely arbitrary power I do not see what constitutional objection could be raised to any disposition which a legislature might make of the property of any decedent."

In a very well considered case, *In re* McKennan,[34] the Supreme Court of South Dakota expressly approves the doctrines laid down in Eyre *v.* Jacob, and disapproves the case of Nunnemacher *v.* State.

In the case of Posey *v.* Commonwealth,[35] the Supreme Court of Appeals of Virginia held that it was "well settled that the power of the State to impose such taxes (i. e. inheritance taxes) was unlimited."

In the case of Commonwealth *v.* Carter,[36] decided on January 22, 1920, the Supreme Court of Appeals of Virginia, goes even beyond the principles of Eyre *v.* Jacob. The court holds:

> "It (i. e. the inheritance tax) is an excise tax, a tax upon a civil right or privilege which only exists because granted by the State. The person who succeeds to the property of a decedent can only do so upon such terms as the Legislature imposes. He has no property right therein except such as the Legislature sees fit to permit. * * *
>
> "It being perfectly clear that there is no inherent right to succeed to property of decedent's (on the contrary, the State has the inherent sovereign right to impose conditions on such succession) it follows that the person who takes it has no property interest in so much of that property which the

[33] 170 U. S. 283.
[34] 25 S. D. 369, 126 N. W. 611, 33 L. R. A. (N. S.) 606.
[35] 123 Va. 551, 96 S. E. 771.
[36] (Va.), 102 S. E. 58.

> General Assembly withholds from him. Having no such interest therein, he is not entitled either to notice or day in Court with reference to such part as the State, under its unquestioned and inherent power, withholds."

A doctrine and line of reasoning similar to the above seems to have been adopted by the Supreme Court of Michigan in the case of Union Trust Company *v.* Probate Judge,[37] though in this latter case a method and opportunity of appeal were expressly provided for.

Judge Sims dissents from the opinion of the majority of the court in the case of Commonwealth *v.* Carter[38] and companion cases, and holds that the Inheritance Tax Act, adopted by the General Assembly of Virginia in 1916, was unconstitutional in that there was no provision either in the Act or in the general law for giving to persons assessed with such taxes notice of the proceeding or an opportunity to be heard. The position taken by Judge Sims is similar to that taken by the Supreme Court of Iowa in the case of Ferry *v.* Campbell.[39]

Judge Prentiss who delivered the opinion of the majority of the court in Commonwealth *v.* Carter, held that no injustice could possibly result from the failure of the law to provide for a hearing, since the court of equity, when its aid was sought to prevent the levy of an alleged illegal or void assessment, could then proceed to levy the proper tax under its general equity jurisdiction.

Judge Prentiss reasons that because the State has a right to take the whole estate, and in that event a day in court would be useless, then it follows that if the State gratuitously allows, by statute, the heir a certain percentage, that it need not give him his day in court. With great respect, we can but believe the heir is, in such case, entitled to his day in court in order that he may be given a hearing as to just what is the proper proportion to be awarded to him, and that such be judicially determined. If the State allows him a portion and gives him a legal right to that portion, it must allow him a hearing to deter-

[37] 125 Mich. 487, 84 N. W. 1101.

[38] *supra.*

[39] 110 Iowa 290, 81 N. W. 604, 50 L. R. A. 92.

mine how his share shall be arrived at. But it is contended that the hearing and day in court is given to him when he goes into a court of equity and seeks to enjoin the levy of the tax, because the law assessing the tax is unconstitutional and void in that there is no method of hearing provided either by the provisions of that law or the general law. He comes into equity, it is argued, and he must do equity by paying the tax, despite the fact that the very reason he came into equity was because he deemed the tax unconstitutional and void.

Assuming the doctrine in the Carter case sound, how can we escape the conclusion that no law can ever be held unconstitutional because no opportunity to be heard is provided by law, since a person can always go into equity, praying that the prosecution of the law under the act be enjoined? And having thereby come into the court of equity for this special purpose, the court will take jurisdiction of the whole matter and finally determine it on its merits. This point is made by Judge Sims, who, in his dissenting opinion in the case of Withers *v.* Jones,[40] a companion case to the Carter case, in referring to the position taken by the majority of the court in holding the Act constitutional, says: "If this position were tenable no tax could ever be held to be unconstitutional, because of its failure to afford due process of law."

The General Assembly of Virginia recognized the weaknesses of the 1916 Inheritance Tax Act, and amended it in 1918, and again at its special session in 1919.

Power of Municipal Corporations to Levy Death Duties

The question of the power of a municipal corporation to levy an inheritance tax seems to have arisen only in the State of Virginia.[41] In three cases,[42] the Supreme Court of Appeals of Virginia has decided that a municipal corporation has no power to levy such taxes under its general taxing power. The opinions would seem to suggest, however, that municipal corporations

[40] (Va.), 102 S. E. 68.

[41] 18 L. R. A. (N. S.) 960, note.

[42] Wytheville *v.* Johnson's Ex'r, 108 Va. 589, 62 S. E. 328, Peters *v.* Lynchburg, 76 Va. 927; Schoolfield, Ex'r *v.* Lynchburg, 78 Va. 766.

could levy such taxes if the power to do so should be expressly conferred by the State.

CONSTITUTIONAL LIMITATIONS.

The cases hereinbefore cited establish the principle that there is no constitutional objection to an inheritance tax being graduated with regard both to the value of the share, and to the remoteness of the relationship between the deceased and the recipient of the property. Exemptions from a statute taxing legacies and inheritances do not deny to any person equal protection of the laws,—*provided they apply equally to all persons in the same class.* It rests with the legislature to determine the amounts of the exemptions and the basis of the classification.[43] Despite the language used in the cases of Eyre *v.* Jacob and Commonwealth *v.* Carter, it is believed that the basis of classification must be a reasonable one.

The ideal in all forms of taxation today would seem to be to get the greatest amount of revenue from the smallest number of people. "The greatest amount from the smallest number" is a popular slogan. There is an open season on taxing men of means, and their protection lies, for the most part, in their constitutional rights.

In the case of Eyre *v.* Jacob, the court recognized that there were constitutional limitations, in the following clause:

> "Principles of natural justice and the spirit of the Constitution demand that the tax upon such a subject should be regulated in strict proportion to the value of the benefit it secures."

The Fourteenth Amendment to the United States Constitution provides that no State shall deny to any person within its jurisdiction the equal protection of its laws. This means that a tax law which makes an unjust discrimination—which takes one person at one rate and another one within the same class and under similar circumstances at another rate,—or exempts him altogether,—denies to the former the equal protection of the law Classification is proper, but there must be uniformity within the

[43] COOLEY, CONSTITUTIONAL LIMITATIONS, p. 708.

same class. If persons under the same circumstances and condition are taxed differently, this constitutes arbitrary discrimination, and not classification. Two legatees taking from two testators, of the same relationship to their respective testators, and receiving similar amounts, must both be either exempt, or, if required to pay a tax, the amounts must be the same. This question is fully treated by the Supreme Court of Wisconsin in the case of Black *v.* State,[44] in which the inheritance tax act under consideration was held unconstitutional.

Despite the *dicta* to the contrary, we cannot believe that the legislature of a State has a purely arbitrary power in determining the disposition of a decedent's estate. Could the legislature of a State constitutionally enact that the estate of every person dying within the limits of that State should be given to the Democratic members of that legislature, or even be divided equally among all the members? Or could the legislature enact a law providing that every estate, above ten thousand dollars, should go to the State in order to keep up its public institutions of learning? Is the State in the matter of enacting death duties to have the power of an absolute monarch of feudal times? We do not believe that a State can possess any power inconsistent with the "principles of natural justice and the spirit of the constitution."

No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions, intended to secure that equality of right which is the security of a free government.

R. W. Carrington.

RICHMOND, VA.

[44] 113 Wis. 205, 89 N. W. 522.